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# Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

## Note by the Secretariat

**Addendum**

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# II. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

## B. Notes on draft procedural rules

### 8. Neutral

#### 1. Draft article 9 (Appointment of neutral)

*"1. The ODR [provider/platform/administrator] shall appoint the neutral promptly following commencement of the facilitated settlement stage of proceedings. Upon appointment of the neutral, the ODR provider shall promptly notify the parties of the name of the neutral and any other relevant or identifying information in relation to that neutral.*

*"2. The neutral, by accepting appointment, confirms that he or she can devote the time necessary to conduct the ODR proceedings diligently, efficiently and in accordance with the time limits in the Rules.*

*"3. The neutral shall, at the time of accepting his or her appointment, declare his or her impartiality and independence. The neutral, from the time of his or her appointment and throughout the ODR proceedings, shall without delay disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence to the ODR provider. The ODR provider shall promptly communicate such information to the parties.*

*Objections to the appointment of a neutral*

*"4. Either party may object to the neutral's appointment within [two (2)] calendar days (i) of the notification of appointment without giving reasons therefor; or (ii) of a fact or matter coming to its attention that is likely to give rise to justifiable doubts as to the impartiality or independence of the neutral, setting out the fact or matter giving rise to such doubts, at any time during the ODR proceedings.*

*"5. Where a party objects to the appointment of a neutral under paragraph (4)(i), that neutral shall be automatically disqualified and another appointed in his or her place by the ODR provider. Each party shall have a maximum of [three (3)] challenges to the appointment of a neutral following each notice of appointment, following which the appointment of a neutral by the ODR provider will be final, subject to paragraph (4)(ii). Alternatively if no challenges are made within two (2) days of any notice of appointment, the appointment will become final, subject to (4)(ii).*

*"6. Where a party objects to the appointment of a neutral under paragraph (4)(ii), the ODR provider shall make a determination within [three (3)] calendar days, regarding whether that neutral shall be replaced.*

*"7. In the event both parties object to the appointment of a neutral under paragraph (4)(i) or (4)(ii), that neutral shall be automatically disqualified and another appointed in his or her place by the ODR provider, notwithstanding the number of challenges that has been made by either party.*

*Objections to provision of information*

*"8. Either party may object, within three (3) calendar days of the final appointment of the neutral, to the provision by the ODR provider to the neutral of information generated during the negotiation stage. Following the expiration of this three-day period and in the absence of any objections, the ODR provider shall convey the full set of existing information on the ODR platform to the neutral.*

*Number of neutrals*

*"9. The number of neutrals shall be one."*

*Remarks*

*Paragraph (1)*

2. Further to the agreement of the Working Group at its twenty-eighth session that some basic information in relation to a neutral ought to be provided to the parties, but that the provision of that information ought not unduly to burden the ODR provider (A/CN.9/795, para. 128), language providing for additional identifying information in respect of a neutral has been included in paragraph (1) for the consideration of the Working Group.

3. The following sentence has been inserted at the beginning of paragraph (1) to improve clarity of drafting and to reflect draft article 7(1): "*The ODR provider shall appoint the neutral promptly following commencement of the facilitated settlement stage of proceedings.*"

4. The Working Group may wish to note that the terms "ODR platform" and "ODR administrator" have been added by way of alternative to paragraph (1) for illustrative purposes, but that remaining consequential changes in draft article 9 would necessarily have to be made subject to the determination of the Working Group in relation to draft article 2, paragraphs (2)-(3).

*Paragraph (2)*

5. Paragraph (2) has been modified to reflect the discussions of the Working Group at its twenty-eighth session, and mirrors the language in the second model statement to article 11 set out in the Annex to the UNCITRAL Arbitration Rules 2010 (A/CN.9/795, paras. 130-132).

*Paragraph (6)*

6. The residual discretion left to an ODR provider under paragraph (6) may require further guidance, either in guidelines or in the Rules themselves. In that respect, language has been inserted in document A/CN.9/WG.III/WP.128.

*Paragraph (7)*

7. Paragraph (7) reflects the agreement of the Working Group at its twenty-eighth session to reflect in article 9 the principle that where both parties object to the appointment of a neutral, that neutral ought to be replaced without any decision-making on behalf of the provider (A/CN.9/795, para. 136).

8. **[Draft article 10 (Resignation or replacement of neutral)**

*"If the neutral resigns or otherwise has to be replaced during the course of ODR proceedings, the ODR provider through the ODR platform shall appoint a neutral to replace him or her pursuant to article 9. The ODR proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.]"*

9. **Draft article 11 (Power of the neutral)**

*"1. Subject to the Rules, the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate.*

*"1 bis. The neutral, in exercising his or her functions under the Rules, shall conduct the ODR proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute. In doing so, the neutral shall remain at all times wholly independent and impartial and shall treat both parties equally.*

*"2. Subject to any objections under article 9, paragraph (8), the neutral shall conduct the ODR proceedings on the basis of all communications made during the ODR proceedings.*

*"3. At any time during the proceedings the neutral may request or allow the parties (upon such terms as to costs and otherwise as the neutral shall determine) to provide additional information, produce documents, exhibits or other evidence within such period of time as the neutral shall determine.*

*["4. The neutral shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence or validity of any agreement to refer the dispute to ODR. For that purpose, the dispute resolution clause shall be treated as an agreement independent of the other terms of the agreement. A determination by the neutral that the contract is null shall not automatically entail the invalidity of the dispute resolution clause.]*

*"5. Where it appears to the neutral that there is any doubt as to whether the respondent has received the notice under the Rules, the neutral shall make such inquiries or take such steps as he or she deems necessary to satisfy himself or herself with regard to such receipt, and in doing so may where necessary extend any time period provided for in the Rules. [As to whether any party has received any other communication in the course of the ODR proceedings, the neutral may make such inquiries or take such steps as he or she deems necessary to satisfy himself or herself with regard to such receipt, and in doing so, may, where necessary, extend any time period provided for in the Rules.]"*

*Remarks*

*Paragraph (1)*

10. The square bracketed "[and the Guidelines and Minimum Requirements for ODR Neutrals]" following the words "subject to the Rules" has been deleted, on the basis that the legal nature and addressees of the Rules and of supplementary guidelines differ, and the former ought not to be incorporated by reference into the latter (see A/CN.9/WG.III/WP.127, para. 28, and A/CN.9/WG.III/WP.128).

*Paragraph (2)*

11. The Working Group may wish to note that some slight drafting modifications have been made to paragraph (2) to maintain consistency with other provisions in the Rules.

*Paragraph (4)*

12. The language in paragraph (4) has been slightly modified to improve clarity, including the substitution of the word "agreement" for "contract" in the second sentence, in accordance with the way that term is set out in the preamble and paragraph (1).

13. The Working Group may wish to consider whether a traditional competence-competence and severability provision is necessary or appropriate in the context of Track II proceedings.

14. In any event, as identified by the Working Group at its twenty-eighth session, the requirement in draft article 1, paragraph (1)(bis), for the parties to agree to ODR proceedings in an agreement separate from the transaction, is potentially confusing when read alongside paragraph (4) (A/CN.9/795, para. 145).

## 9. General provisions

### 15. Draft article 12 (ODR provider)

*"[The ODR provider/platform/administrator shall be specified in the dispute resolution clause.]"*

*Remarks*

16. The Working Group may wish to consider, in relation to draft article 12: (i) if an entity administering the dispute ought to be specified in the dispute resolution clause; (ii) if so, which of the entities involved in administering the dispute (provider/platform/administrator) ought that to be; and (iii) whether the Rules ought to mandate such specification, or whether the requirement to specify might better be placed in guidelines.

### 17. Draft article 13 (Language of proceedings)

*"[1. Subject to an agreement by the parties, the neutral shall, promptly after its appointment, determine the language or languages to be used in the proceedings[, having regard to the parties' due process rights under article [x]].*

*"2. All communications, with the exception of any communications falling under paragraph (3) below, shall be submitted in the language of the proceedings (as agreed or determined in accordance with this article), and where there is more than one language of proceedings, in one of those languages.*

*"3. Any documents attached to the communications and any supplementary documents or exhibits submitted in the course of the ODR proceedings may be submitted in their original language, provided that their content is undisputed.*

*"4. When a claim relies on a document or exhibit whose content is disputed, the neutral may order the party serving the document or exhibit to provide a translation of that document into [a language which the other party understands] [the other language of the proceedings] [failing which, the language the other party included in its notice or response as its preferred language]]."*

18. **Draft article 14 (Representation)**

*"A party may be represented or assisted by a person or persons chosen by that party. The names and designated electronic addresses of such persons [and the authority to act] must be communicated to the other party by the ODR provider."*

*Remarks*

19. The Working Group may wish to consider whether representation is necessary or appropriate in Track II proceedings.

20. **Draft article 15 (Exclusion of liability)**

*"[Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the ODR provider and neutral based on any act or omission in connection with the ODR proceedings under the Rules.]"*

21. **Draft article 16 (Costs)**

*"[The neutral shall make no [decision] [award] as to costs and each party shall bear its own costs.]"*

*Remarks*

22. The Working Group may wish to consider whether a costs provision is necessary or appropriate in Track II proceedings.